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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 45

WILLIAM C. LINN, PETITIONER

v.

UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

In our memorandum filed in response to the Court's invitation to express the views of the United States as to whether the petition for certiorari should be granted (380 U.S. 930), we urged the Court to review the case and stated that we would file a comprehensive brief if certiorari was granted.

OPINIONS BELOW

The opinion of the district court (R. 35) is unreported. The opinion of the court of appeals (R. 40) is reported at 337 F. 2d 68.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1964 (R. 46). The petition for certiorari was filed on January 9, 1965, and granted on May 24, 1965 (R. 47; 381 U.S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act bars the maintenance of a civil action for libel instituted under State law by an official of an employer subject to the Act, seeking damages for defamatory statements made during a union organizing campaign by the union and its officers allegedly with knowledge that the statements were false.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A (pp. 53–54, *infra*).

STATEMENT

On December 17, 1962, petitioner Linn, assistant general manager of the North Central Region of Pinkerton's National Detective Agency, Inc., filed a complaint in the United States District Court for the Eastern District of Michigan against the United Plant Guard Workers of America, Local 114, its president, its vice-president, and a Pinkerton employee, Leo J. Doyle. The complaint alleged that, during a campaign to organize Pinkerton's employees in Detroit, the defendants had circulated

among those employees leaflets which stated the following:

> (7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> United Plant Guard Workers now has evidence.
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> B. Employing 52 men.
>
> C. Some of these jobs are 10 yrs. old!
>
> (8) Making you feel kind sick & foolish.
>
> (9) The men in Saginaw were deprived of their *right* to *vote* in three N.L.R.B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were *robbed* of pay increases. The Pinkerton managers (sic) were *lying* to us—all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail! [R. 4–5; emphasis in original.]

The complaint further alleged (R. 5) that plaintiff was one of the managers referred to in this material, and that defendant thereby meant, and intended for the readers thereof to understand, that:

> * * * plaintiff had deliberately lied to part or all of Pinkerton plant guard employees; that plaintiff had lied and/or deliberately falsified information required of him to be submitted to the National Labor Relations Board; that plaintiff had lied to or deliberately misled Pinkerton employees concerning a prior Union

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> contract; that plaintiff had deliberately withheld from Pinkerton employees wages earned through pay increases; that plaintiff had committed certain criminal acts for which he would be prosecuted.

Finally, the complaint alleged (R. 5) that all the foregoing was "wholly false, defamatory and untrue," and that this was known to defendants. It also asserted that the statements were libelous *per se*. Damages in the amount of $500,000 were claimed (R. 7), and the complaint was later amended to increase the damage claim to $1,000,000 (R. 39). The only basis of federal jurisdiction alleged in the complaint was diversity of citizenship (R. 3).

All of the defendants except Doyle moved to dismiss the complaint on the ground (among others) that the matter was within the exclusive jurisdiction of the National Labor Relations Board (R. 8). An affidavit and other documents attached to the motion to dismiss disclosed that prior to the filing of the complaint Pinkerton's had filed unfair labor practice charges with the Regional Director of the National Labor Relations Board, alleging that the distribution by the Union of the leaflet described above, as well as three other such leaflets, restrained and coerced Pinkerton's employees in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) (see R. 8–9, 35–36).[1] The Regional Director had declined to issue a complaint, however, stating:

> The above-mentioned charge against United Plant Guard Workers of America, Local 114,

[1] *United Plant Guard Workers of America, Local 114 (Pinkertons National Detective Agency, Inc.)*, 7–CB–1008.

> was based upon four allegedly objectionable leaflets prepared and circulated by an employee of your company. Such employee was not an officer or member of the charged union, nor was there any evidence that he was acting as an agent of such union. There is no evidence that the union was involved in any respect in the drafting and circulation of the leaflets. In view of the fact that the union is not responsible for the distribution of said leaflets, the charge against the union is wholly without basis. [R. 22–23.]

And on appeal from the Regional Director's ruling, the General Counsel of the Board had on February 13, 1963, sustained his ruling on the same grounds (R. 34).

On June 15, 1963, the district court dismissed the complaint as to the Union, its president and its vice-president, on the ground that even if the Union was responsible for distributing the material in question, "this would arguably constitute an unfair labor practice under Section 8(b)" of the National Labor Relations Act, and that in these circumstances this Court's decision in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, *infra,* pp. 14–17, compelled a dismissal on preemption grounds[2] (R. 36). On appeal, the Sixth Circuit affirmed. It assumed, for purposes of decision, that the statements in question were "false, malicious, clearly libelous and damaging to plaintiff Linn, albeit they were relevant to the

[2] Defendant Doyle did not move for dismissal of the action as to him. Presumably, this part of the case is still before the district court.

union's campaign" (R. 41). But it read *Garmon*, as had the district court, to bar the States from granting relief [3] where, as in the instant case, the conduct complained of arguably violated the National Labor Relations Act. The court noted, however, that its decision was "limited to a suit for libelous statements growing out of and relevant to a union's campaign to organize the employees of an employer subject to the National Labor Relations Act" (R. 46).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents a difficult question of increasing practical importance in the administration of the federal labor laws. It is whether and to what extent the comprehensive scheme of federal regulation of labor relations embodied in the National Labor Relations Act of 1935 and subsequent amendatory legislation should be deemed to have superseded the remedies provided by State law for defamations made during labor disputes in industries subject to the Act. Two competing interests, both substantial, are involved in this question. The first is the interest in maintaining the integrity, the efficacy, and the uniformity of the national policy which Congress has laid down to govern labor disputes affecting interstate commerce. The second is the traditional concern and responsibility of the States to protect their citizens against the damage to reputation

[3] Since the only basis of federal jurisdiction alleged was diversity of citizenship (see p. 4, *supra*), any relief granted would have to be predicated on State law, in this case the law of Michigan where the alleged defamation occurred. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.

which results when immoral, unethical or criminal conduct is falsely imputed to an individual. Nowhere in the language or the legislative history of the Act has Congress said how these interests are to be reconciled. It therefore devolves upon this Court to work out a solution that will effectuate the purposes and design of the federal regulatory scheme without unduly hindering the States in the discharge of their legitimate and substantial responsibilities.

The specific question presented, difficult and important in its own right, is also significant for the light it sheds on the recurrent general problem of federalism presented by State intervention in labor disputes subject to the federal regulatory scheme. In our role as *amicus curiae,* we attempt to develop an analytical framework that may be useful to the Court in dealing with the larger problem whether or not the particular conclusions we reach are accepted. We begin our analysis with a review of the applicable legal principles and general standards which emerge from the decisions of this Court culminating in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236. We show that these decisions establish that the National Labor Relations Act occupies the field of labor relations, thereby precluding (with certain express statutory exceptions not relevant here) State action that is specifically intended to regulate such relations, or rests upon an appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes, or otherwise encroaches directly on the area of conduct and interests comprehensively regulated by the Act; but that the de-

cisions leave open the question of State power to enforce against the parties to such disputes laws intended, rather, for the protection of substantial interests within the primary responsibility of the States—for example, the interest in domestic peace and order, and the interest in the protection of an individual's reputation. Therefore, the present case raises an essentially novel issue as to which the prior decisions are not controlling. The courts below erred in concluding that the complaint must be dismissed on the authority of *Garmon*.

We argue, next, that State action of the latter type (such as providing remedies for defamation) should be deemed superseded only when there is a clear danger of palpable conflict with the objectives of the federal labor laws—and then only to the extent clearly necessary to eliminate the conflict. We then undertake to examine the practical consequences of two extreme positions which might be taken on the question presented. The first is that State laws of defamation are wholly unaffected by the federal scheme, and that suits for defamation arising out of labor disputes subject to the federal laws may be maintained precisely as in any other context (the position of the Supreme Court of Pennsylvania in the *Meyer* case, petitions for certiorari pending, see n. 12, p. 50, *infra*). The second is that all such suits are barred (the position of the courts below in the instant case). We show that the first of these alternatives is unacceptable because the application of the conventional principles of defamation in the context (where the problem is most likely to arise) of a campaign to determine who

shall be the exclusive collective bargaining agent for the workers in a particular plant or other bargaining unit could appreciably limit the free exchange of views and opinions which federal law is intended to encourage in such campaigns, and which Section 7 of the National Labor Relations Act expressly protects; and could also provide employers, in areas where local feeling is hostile to union-organizing efforts, with a potent weapon for deterring such efforts through defamation suits seeking heavy damages for trivial exaggerations or distortions made by union adherents. These results would disturb the balance between labor and management sought to be struck by the federal scheme. But the opposite extreme—barring all defamation actions arising from labor disputes affecting interstate commerce, regardless of the nature and consequences of the alleged defamation—is also unsatisfactory. It would leave the individual completely without remedy even for substantial injury inflicted by malicious, utterly untruthful, and very damaging statements about his character made in the course of a labor dispute. Surely no such result was intended by Congress when it enacted the National Labor Relations Act, and we show that no such result is necessary to protect the integrity and effectuate the policies of the Act.

After analyzing and rejecting these extreme alternatives, we propose a middle ground persuasively supported by analogy from other applications of federal policy to limit defamation actions, especially this Court's decision in the *Times* libel case (*New York Times Co.* v. *Sullivan,* 376 U.S. 254). We show that

a reasonable accommodation of the competing interests, which minimizes conflict with the federal scheme while leaving the States adequate authority to protect the interest in reputation of their citizens, is to construe the National Labor Relations Act as barring the maintenance of such an action where the defendant establishes either that he did not make the alleged defamation with "actual malice" or that the defamation was not a "grave" one, as we define those terms. This two-pronged test corresponds to that the Labor Board applies in determining whether allegedly defamatory matter is within the broad scope of the Section 7 protected right of employees to engage in concerted activity related to union organizing and collective bargaining.

I

THE QUESTION PRESENTED IS NOT CONTROLLED, AS THE LOWER COURT BELIEVED, BY THE "PREEMPTION" DECISIONS OF THIS COURT

A. THIS COURT HAS ONLY BARRED STATE ACTION DIRECTLY REGULATING LABOR RELATIONS

In a series of early decisions, this Court held that the States could not interfere with the exercise of rights protected by the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *International Union of United Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Amalgamated Assn.* v. *Wisconsin Board*, 340 U.S. 383. Then in its landmark decision in *Garner* v. *Teamsters Union*, 346 U.S. 485, the Court held that the States were also barred from extending their "own form of relief" (*id.* at 489) for

practices proscribed under the Act, and hence that a State labor relations law (patterned after the federal Act) could not be used to enjoin picketing which was alleged to be coercive, and which, if the allegations of the complaint were true, was also a federal unfair labor practice. The Court noted that Congress had done more than "merely lay down a substantive rule of law to be enforced by any [competent] tribunal"; it had gone on "to confide primary interpretation and application of its rules to a specific and specially constituted tribunal * * *. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*id.* at 490). Pointing out that in fact the State labor law under which the action had been brought, like the federal law, appeared to create public rather than private rights, the Court stated that, in any event, "[t]he conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent" (*id.* at 498–499). Moreover, "[t]he detailed prescription [in the federal Act] of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing

free for purposes or by methods which the federal Act prohibits" (*id.* at 499–500). A similar result was reached in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, where this Court held that a State could not invoke its restraint of trade laws to enjoin an alleged secondary boycott, that being a type of activity comprehensively regulated by the federal Act and hence barred to State regulation.

After *Garner*, the decisions of this Court seemed to diverge. In one line of cases, the Court held that the *Garner* principle was applicable—and the States barred from entering any kind of cease and desist or injunctive order—even to labor disputes over which the Labor Board declined to exercise jurisdiction because the dispute was predominantly local in nature; thus, a regulatory "no man's land" was created. See, *e.g.*, *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1; *San Diego Building Trades Council* v. *Garmon*, 353 U.S. 236. But the States were permitted to enjoin violent conduct arising out of a labor dispute. See *United Automobile Workers* v. *Wisconsin Board*, 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; see, also, *Allen-Bradley Local* v. *Wisconsin Board*, 315 U.S. 740. And in another line of "violence" cases the Court, in some sweeping language, indicated that the power of the States to award damages in respect of conduct constituting a federal unfair labor practice might be unlimited.

Thus, in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, the company sued the union for damages in a State court on a common-law tort claim alleging that, in order to ob-

tain recognition as the exclusive bargaining agent, the union had "threatened and intimidated respondent's [*i.e.*, the company's] officers and employees" (347 U.S. at 658); and this Court held that the State court could entertain the suit. As in *Garner*, the conduct alleged to violate State law was also a federal unfair labor practice. But whereas in *Garner* the plaintiff had sought only injunctive relief, and the federal administrative remedy of a cease and desist order could have provided essentially the same relief, nothing in the Board's remedial arsenal could make the company whole; the Board's limited authority to grant monetary awards did not extend to damages for the union's misconduct. The Court reasoned that "[i]f Virginia is denied jurisdiction in this case, it will mean that where the federal preventive procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done" (*id.* at 669).

A similar result was reached in *Automobile Workers* v. *Russell*, 356 U.S. 634, also a violence case, though here damages were sought by an employee. In contrast to the situation in *Laburnum*, the Labor Board was not powerless to award the plaintiff monetary relief; although it could not have compensated him for the injury he had sustained, it could have ordered that he be granted back pay for the time that he was prevented from working. But, emphasizing that compensation to victims of unfair labor practices is not the objective of the back-pay provisions of the federal Act, this Court rejected the argument

that the Act constituted the "exclusive pattern of money damages for private injuries. Nor do we think that the Alabama tort remedy, as applied in this case, altered rights and duties affirmatively established by Congress" (*id.* at 645).

Although the Court's decisions seemed to make a critical distinction between injunctive and damage remedies, both *Laburnum* and *Russell* had, as noted, involved a kind of conduct—violence—in which the State regulatory interest was plainly very great, great enough, indeed, so that the States were free to grant injunctive relief as well (see p. 12, *supra*). When *San Diego Building Trades Council* v. *Garmon, supra,* returned to the Court after having been remanded, it was clear that in that case, at least, the State had awarded damages for conduct constituting a federal unfair labor practice but not involving violence or the threat of violence. The State court had held on remand that the union's picketing (designed to persuade customers and suppliers not to deal with the respondents), while peaceful and constituting an unfair labor practice under Section 8(b)(2) of the National Labor Relations Act, also violated State law; and awarded damages of $1,000, representing the losses respondents had sustained by reason of the picketing. This Court reversed. 359 U.S. 236. Observing that in its previous decisions in the area "language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved" (359 U.S. at 241), the Court used the occasion to attempt a comprehensive restatement of governing principles:

> * * * We have been concerned with conflict * * * with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system * * * has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act * * * [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [*Id.* at 243–244.]

For the last proposition, the Court cited the *Laburnum* and *Russell* decisions, and later in its opinion made clear that those decisions should be read as permitting State regulation of "conduct marked by violence and imminent threats to the public order" (359 U.S. at 247; see also *id.* at 248, n. 6), not as broadly authorizing the States to award damages for any and all federal unfair labor practices. The Court noted that State "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obli-

gation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme" (*id.* at 247).

In holding the State's award of damages barred on the facts presented, which involved no violence or other similarly compelling State interest apart from that in the regulation of labor relations as such, this Court stated: "Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulations ~~which~~ would create potential frustration of national purposes" (*id.* at 244). This broad language should, however, be viewed in its context. In finding that the union's conduct violated State law, the State court relied on enactments dealing specifically with labor relations as well as on general tort principles (see 359 U.S. at 239). And it seems clear that, whatever the technical legal basis of its action, the State court, in awarding damages to the plaintiff, was in fact directly regulating labor relations—just as the State court in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468 (p. 12, *supra*), in holding that secondary strike activity constituted a conspiracy in restraint of trade under State law, had in fact been making a judgment of labor policy. Whatever its label, State action to regulate conduct so

central to labor relations as recognitional picketing and secondary boycotts, at least where no violence is present, cannot realistically be divorced from labor policy.[4] Such State action cannot be viewed merely in terms of the protection of an interest (like the interest in preventing breaches of the peace, as in *Laburnum, Russell,* and the other violence cases) independent of any appraisal of the conflicting interests of management, labor and the public in union organization and labor disputes and within the primary responsibility of the States.

The basic holding of *Garmon,* then, is that federal law has so far occupied the field of labor relations in industries affecting interstate commerce that the States may not regulate such relations, except where the conduct involved is not even "arguably" either protected or prohibited by the federal Act (359 U.S. at 245).[5] The Court has reaffirmed this principle in

[4] The Court in *Garner* and *Weber* had emphasized how extensively federal law regulated the activities there involved. See Michelman, *State Power to Govern Concerted Employee Activities*, 74 Harv. L. Rev. 641, 672 and n. 143 (1961). Basically the same activity—peaceful picketing—was involved in *Garmon* as in *Garner.*

[5] "* * * In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * * The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy" (359 U.S. at 246). Nor may the States regulate conduct which, while neither protected nor prohibited, was designed by the federal Act to be left free from governmental interference. See *Teamsters Union* v. *Morton*, 377 U.S. 252.

a number of cases decided since *Garmon*. See *Liner* v. *Jafco, Inc.*, 375 U.S. 301; *Plumbers' Union* v. *Borden*, 373 U.S. 690; *Iron Workers* v. *Perko*, 373 U.S. 701; *Construction Laborers* v. *Curry*, 371 U.S. 542. But in neither *Garmon* nor any other case has this Court ruled that the States may not enforce traditional rights of action not grounded on precepts of labor policy—the right to recover damages for personal injury, for example—merely because the conduct involved occurs in a labor dispute subject to the federal Act. *Laburnum* and *Russell*, even as qualified in *Garmon*, suggest that they may.

B. AFFORDING A REMEDY FOR DEFAMATION UNDER STATE LAW IS NOT THE DIRECT REGULATION OF LABOR RELATIONS

The interest in reputation is plainly distinct from matters of labor policy. Regulating defamation, even when it arises in the context of a labor dispute, is not the regulation of labor relations—the field that Congress specifically has occupied. Defamation is not an area like picketing, where there is a specific and direct federal interest which is reflected in extensive and explicit federal regulation. The only federal concern with defamation is incidental, arising from the need to assure free and wide-open discussion and debate in organizational campaigns (see pp. 24–29, 37, *infra*). The Board has no mandate to concern itself with reputation, and no power to award damages or other relief for injuries thereto. Therefore, the rule of *Garmon*, which precludes State regulation of conduct in the field of labor relations unless it is plain beyond argument that such conduct is neither pro-

tected nor prohibited under federal law, is, we submit, inapplicable.[6]

If we are wrong in our interpretation of the reach of *Garmon*, we would still strongly argue that defamation, like violence, is a subject so "deeply rooted in local feeling and responsibility" (359 U.S. at 244) that the States retain the power to act. This Court in *Garmon* did not indicate that the prevention of violence was the only permissible predicate of State intervention in labor disputes,[7] and the interest in reputation with which the tort of defamation is concerned is not unlike the interest in bodily integrity involved in the tort of assault. Defamation is more than just an economic tort like unlawful interference with one's business (*Garmon*). Indeed, one of the traditional justifications of providing legal remedies for defamation is to head off breaches of the peace which might be provoked by defamatory statements. See *Beauharnais* v. *Illinois*, 343 U.S. 250, 254.

[6] If it is applicable, the courts below were correct in their view that it embraces the instant suit. We show *infra*, pp. 26–29, that some defamations are federally protected, and some federally proscribed. But even if defamation were neither protected nor proscribed, defamation suits would be barred because the underlying conduct would invariably be at least arguably protected. For the alleged defamation could be found to be truthful; and making a statement in the course of a union organizational campaign that is true and relevant to the issues of the campaign is surely within the protection extended in Section 7 of the Act to "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[7] The States have also been permitted to intervene where there is an interference with membership rights (*Machinists* v. *Gonsales*, 356 U.S. 617), or a breach of the collective bargaining contract (*Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261).

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Contrariwise, nothing in the decided cases compels the conclusion that there is no federal limitation on defamation actions arising from labor disputes subject to the federal labor laws. It can hardly be contended that defamation automatically falls within the exception carved by the violence cases. It is clear from other contexts that the law is far more willing to subordinate to competing interests the interest in redressing and preventing defamation than the interest in maintaining peace and order.[8] That defamation suits are predicated on State law designed to protect a substantial interest within the area of the State's primary responsibility, rather than on laws specifically designed to regulate labor relations, and that the Labor Board has authority neither to protect individuals' interest in reputation by awarding compensatory damages nor to deter defamatory conduct by punitive sanctions, cannot, consistently with *Garmon* and *Weber* (see p. 16, *supra*), be deemed controlling. Even in the "violence" cases, moreover, this Court was careful to satisfy itself that the State action in question was not in actual conflict with congressional labor policies. A determination that defamation suits are outside the broad rule of preemption announced in *Garmon* should thus be the beginning, not the end, of inquiry into whether and

[8] See, *e.g.*, *Farmers Union* v. *WDAY*, 360 U.S. 525, 535. Compare this Court's treatment of defamation in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, with its treatment of words inciting to violence in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568. See also *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131, 139, where the Court upheld a State court injunction of, among other things, "massed name-calling * * * calculated to provoke violence."

how far such suits may constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hill* v. *Florida*, 325 U.S. 538, 542.

Enforcement of a State-created right of action, such as defamation, designed for the protection of a substantial interest within the primary responsibility of the State, should not be deemed precluded merely on a showing that it might conceivably have some impact on the structure of labor relations established by federal law. Cf. *Head* v. *New Mexico Board*, 374 U.S. 424; and *id.* at 445 (concurring opinion). Otherwise, enforcement of a State law that set minimum safety conditions for plants located in the State would be barred, on the theory that such a law contracts the area left free by federal law for labor and management to determine their respective rights and duties by voluntary negotiation. A purpose to displace State law in areas of traditional State concern and responsibility—such as personal safety, public order, or reputation—should not be imputed to the federal labor laws (in the absence of evidence of actual congressional intent) unless the danger of conflict with the federal regulatory scheme is real and substantial, not merely remote or theoretical. And if such conflict is found, State law should be deemed preempted only to the extent actually necessary to eliminate the conflict, and with due regard for the fact that the consequence of such preemption is to leave the problems with which the State law deals wholly unresolved. Such problems are, by hypothesis, not peculiarly ones of labor relations. Hence, the

federal labor laws provide no solutions. If State defamation law as applied to labor disputes is deemed preempted by federal law, no law gives a remedy.

A clear case of conflict between a State law based upon a traditionally State-protected interest and federal labor policy would be presented if the State law, as applied, forbade or deterred the exercise of rights specifically granted by Section 7 of the National Labor Relations Act, or required conduct expressly forbidden by it. See *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18; *Bethlehem Steel Co.* v. *New York Board,* 330 U.S. 767. We shall show that some defamation suits create such a conflict. More subtle, but still dangerous, encroachments may be possible, however, undermining important general interests embodied in the federal scheme rather than colliding with a specific policy. See generally Cox, *Federalism in the Law of Labor Relations,* 67 Harv. L. Rev. 1297 (1954). The danger of such encroachments is also involved in the present case. Such general interests, as defined by this Court (see pp. 11–12, 15–16, *supra*), are basically three.

First, there is the interest in assuring that a uniform labor policy for businesses affecting interstate commerce is applied in all parts of the nation. See, *e.g.,* S. Rep. No. 573, 74th Cong., 1st Sess., p. 5. It is contrary to sound economic and social policy that industry should be encouraged to gravitate toward areas where strong community hostility toward the labor movement finds expression in the legal structure governing labor-management relations. To prevent this may require that controversies arising from labor dis-

putes should, so far as possible, be kept out of State courts. The second, and related, interest is in centralizing the regulation of labor disputes in a single, specialized administrative agency with national jurisdiction, acting only in the public interest. One of the major reasons for the establishment of the Labor Board, and the vesting in it of a broad and exclusive jurisdiction, was an abundance of unhappy experience with leaving labor disputes to the processes of the courts; state judicial processes should not be permitted free reign where the result would be to impair the central regulatory role of the Board contemplated by the federal scheme. Third, the extensive web of federal labor legislation which has grown up over the years strikes a deliberate and delicate balance of legal rights and remedies between labor and management, thereby establishing a framework of law and regulation deemed conducive to minimizing labor strife and encouraging collective bargaining. See, *e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess., pp. 1–2. The balance established by Congress can be disturbed, however, if the parties to labor disputes are free to obtain remedies not available under federal law from State courts.

II

NEITHER COMPLETE PRECLUSION OF NOR COMPLETE FREEDOM FOR DEFAMATION SUITS ARISING FROM LABOR DISPUTES CAN TENABLY BE IMPLIED FROM THE FEDERAL LABOR LAWS

We attempted in the preceding part of our brief to establish an analytical framework for considering the specific question presented by this case. In this

9; *Harnischfeger Corp.*, 9 NLRB 676, 689. Since such epithets as "scab", "unfair", and "liar" are more or less common parlance in a labor dispute (see *Cafeteria Employees Union* v. *Angelos*, *supra*) and are generally uttered in "a moment of animal exuberance" (*Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U.S 287, 293), the Board has concluded that the use of such words by employees or their union representative is not so indefensible that it removes those remarks from the protection of Section 7, whether or not they are defamatory. See *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. 2d 472, 479 (C.A. 3); *Bettcher Mfg. Corp.*, 76 NLRB 526, 527, 532–537; *Thor Power Tool Co.*, 148 NLRB No. 131, 57 LRRM 1161; *Socony Mobil Oil Co.*, 153 NLRB No. 97, 59 LRRM 1619. Similarly, the Board has concluded that statements of fact or opinion with respect to matters relevant to a union organizing campaign or a labor dispute are protected by Section 7, even though they may prove to be erroneous and to reflect on the reputation of one of the parties to the dispute, unless it can be shown that the statements were made with actual knowledge of their falsity or without an honest belief in their truth. See *Bettcher Mfg. Corp.*, 76 NLRB 526, 527, 532–537; *Illinois Tool Works*, 61 NLRB 1129, 1151–1153, enforced, 153 F. 2d 811, 815–816 (C.A. 7); *Atlantic Towing Co.*, 75 NLRB 1169, 1170–1173, enforcement denied, 180 F. 2d 726, 182 F. 2d 625 (C.A. 5); *Westinghouse Electric Corp.*, 77 NLRB 1058, 1060–1061, enforcement denied on other grounds, 179 F. 2d 507 (C.A. 6); *American Shuffleboard Co.*, 92 NLRB 1272, 1274–1275, enforced on

other grounds *sub nom. Cusano* v. *National Labor Relations Board,* 190 F. 2d 898 (C.A. 3); *Electronics Equipment Co.,* 94 NLRB 62, 64–65, enforcement denied on other grounds, 194 F. 2d 650, 205 F. 2d 296 (C.A. 2); *Walls Mfg. Co.,* 137 NLRB 1317, 1318–1319, enforced, 321 F. 2d 753 (C.A.D.C.), certiorari denied, 375 U.S. 923. As the Board pointed out in *Atlantic Towing Co., supra,* 75 NLRB at 1172, it would

> be decidedly unrealistic to hold that the organization and concerted activities envisaged by the Act exclude the utterance by employees of honestly believed statements of fact or opinion, which, in some cases, may actually be unfounded in fact.

This Court, too, has, in another context, discerned an area of conflict between the principles of free speech, on the one hand, and State remedies for defamation, on the other. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (discussed further, *infra,* pp. 38–39), the Court held that the First Amendment imposes strict limitations on actions for defamation brought by public officials against critics of their official conduct. (See also *Garrison* v. *Louisiana,* 379 U.S. 64.) The Court stated that "erroneous statement is inevitable in free debate, and * * * must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive' " (376 U.S. at 271–272)—even where the erroneous statement causes "[i]njury to official reputation" (*id.* at 272). It noted that the practical effect of freely allowing defamation suits to be brought by public officials against their critics would be to compel "the critic of official conduct to guarantee the

and the next part, we examine the particular considerations that should, in our view, guide this Court in answering the question, and we try to show that they require the Court to embrace a middle ground between the extreme alternative positions, which we argue are untenable.

A. TO PERMIT DEFAMATION SUITS ARISING FROM LABOR DISPUTES TO BE MAINTAINED WHOLLY WITHOUT LIMITATION WOULD SEVERELY UNDERMINE THE FEDERAL REGULATORY SCHEME

The electoral process is a classic method for the prompt, pacific, and effective resolution of controversy in areas of fundamental importance to large numbers of persons, and Congress has made this process a key part of the machinery established by the National Labor Relations Act to prevent labor strife and promote industrial peace by "bringing employers and employees together to resolve their differences through discussion." *Leedom* v. *Kyne*, 358 U.S. 184, 191 (dissenting opinion). Before such discussion (the process of "collective bargaining") can begin, the employees of the plant or other bargaining unit must have a bargaining agent. Once that agent is selected, the duty of the employer to bargain commences. Thus, prompt and authoritative determination of the employees' bargaining agent is an imperative if the bargaining process is to go forward.

Our national labor relations policy embodies a philosophy of industrial self-government, under which the terms and conditions of employment should be determined by free negotiation between labor and management rather than imposed by government. See

Cox and Bok, *Labor Law* (1962), p. 132. It follows, surely, that the employees' collective bargaining agent, who is responsible for negotiating a contract that will govern the terms and conditions of employment for the employees he represents, should be the free choice of those employees, not a choice dictated by others. This, at all events, is the theory that finds expression in the federal labor laws. Section 7 of the National Labor Relations Act grants employees the right to bargain collectively "through representatives of their own choosing." Section 9(a) provides that "[r]epresentatives designated or selected by the majority of the employees in [the bargaining unit] * * * shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining." And Section 9(c) provides that, should the Board find that a "question of representation exists," it "shall direct an election by secret ballot and shall certify the results thereof."

The electoral process can, of course, be perverted. Elections can be contrived and manipulated to produce a predetermined, not a free, choice. Therefore, it is not enough to ordain elections; the integrity of the electoral process must also be guaranteed. Recognizing the applicability of this principle to representation elections, the framers of the National Labor Relations Act endowed the Labor Board with authority to protect that process, and the Board, accordingly, has many times set aside elections because of coercion, intimidation, or harassment of the employee-voters, misleading or highly inflammatory statements, and similar campaign tactics that interfere with em-

ployees' expressing a free choice in such elections. See, *e.g.*, *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787; see generally Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964).

But in exercising its regulatory powers over campaign tactics, the Board has been mindful of the danger that heavy-handed regulation, though motivated by a laudable desire to assure that employees exercise a rational, wise, and objective choice, could have exceedingly harmful effects on the free-election principle. Labor disputes tend to be heated affairs, and representation campaigns especially can be bitter. Such a campaign is often characterized by extreme charges and countercharges, unfounded rumors, *ad hominem* accusations, misrepresentations, exaggerations, and distortions. See *Cafeteria Employees Union* v. *Angelos*, 320 U.S. 293, 295. Not only would it be impracticable for the Board to take notice of any but grossly unfair campaign tactics; the free exchange of information and opinions, which the electoral process is designed to encourage, would be stifled were the highest standards of dispassionate fairness, reasonableness, and objectivity imposed on campaign utterances. If representation elections are to be free and their results are to command the acceptance of the parties, government interference in the campaign should be avoided except with respect to tactics so extreme that they are likely to make the election result unrepresentative of the actual will of the majority.

The Board's approach, accordingly, has been a highly permissive one. Thus, the fact that an utterance is defamatory and false is not considered, as such, a ground for setting aside a representation election, and *a fortiori* not a basis for an unfair labor practice finding. The Board has made clear that it does not "police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements." *Stewart-Warner Corp.*, 102 NLRB 1153, 1158. It will set aside an election on the basis of untrue campaign statements only where (1) a material fact has been misrepresented, (2) there has been insufficient opportunity for the other party to reply, and (3) it is likely that the misstatement has had an impact on the employees' free choice. See *Hollywood Ceramics Co.*, 140 NLRB 221, 223–224; *F. H. Snow Canning Co.*, 119 NLRB 714, 715, 717–718.

The problem of untruthful and derogatory statements also arises in connection with the Board's administration of Section 7 of the Act, which guarantees to employees "the right to self-organization * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Ordinarily, concerted activity does not lose the protection of Section 7 unless it is clearly repugnant to the provisions or policies of the Act, or other federal laws, or unless it is so indefensible under the circumstances as to render the employee unfit for future employment. See *National Labor Relations Board* v. *Washington Aluminum Co.*, 370 U.S.

truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount" (*id.* at 279), thereby producing an undesirable "self-censorship": "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so" (*ibid.*). The Court drew upon the analogy of the limitations that have been imposed on defamation actions against public officials. "The reason for the official privilege is said to be that the threat of damage suits would otherwise 'inhibit the fearless, vigorous, and effective administration of policies of government' and 'dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' *Barr* v. *Matteo* [360 U.S. 564, 571]" (376 U.S. at 282).

These observations apply with considerable force to representation campaigns, and equally, it would seem, to union organizing and recognitional efforts preceding the actual campaign. Congress and this Court have expressly recognized the applicability of the principles of free speech in the labor field. See Section 8(c), 29 U.S.C. 158(c); *Thomas* v. *Collins,* 323 U.S. 516, 538; *National Labor Relations Board* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477. In this area, too, full liability under conventional defamation principles could have a deterrent effect, producing a self-censorship that would dampen the vigor and limit the variety of the debate (see 376 U.S. at 279); and here, too, the vigor and ardor of the responsible officials,

both of labor and management, could be impaired by unlimited damages liability. A similar concern led this Court to hold that the Federal Communications Act by implication grants radio and television stations immunity from liability for defamatory statements made during a political broadcast. *Farmers Union* v. *WDAY*, 360 U.S. 525. The Court noted that if the station was not given such immunity the result would be "censorship * * * [which] would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of considerations relevant to intelligent political decision," contrary to congressional intent. *Id.* at 530–531. Similarly, we submit, the national labor policy requires that some limitations, at least, be recognized on the power of the States to give remedies under conventional principles of defamation.

Suppose, for example, that in the course of a bitter representation campaign in which an independent union seeks to displace a company-dominated employees association as exclusive bargaining agent, one of the union leaders charges the company president with having "lied" about the company's financial ability to pay higher wages. The union leader believes the charge to be true. But the company president sues him, and the union, for defamation, asking general damages of $1,000,000. Although the defendants introduce evidence to establish the defense of truth, the verdict is for the plantiff and he is awarded substantial damages though in fact no pecuniary injury was shown. Such an award would be proper

under conventional principles of defamation. See 1 Harper and James, *Torts* (1956), § 5.30, pp. 468–472. Imposing extensive liability for statements uttered in the course of a heated representation campaign would thus inevitably discourage free and wide-open debate and make the campaigners cautious and timid. This would impair the effectiveness of the representation campaign as a method whereby the employees may express themselves on matters of fundamental importance to them. The Labor Board has so recognized, in ruling that it is an unfair labor practice for an employer to discharge an employee for disparaging or defaming him honestly, though falsely, in a statement relevant to a labor dispute (see cases cited at pp. 28–29, *supra*).

The dangers that unrestricted defamation suits pose to the federal policy of free expression in representation and other organization campaigns are more than hypothetical. In Appendix B, pp. 55–57, *infra,* we summarize briefly the reported cases involving suits for defamation arising out of labor disputes, indicating the salient allegations of the complaint where that information is available. Our summary shows that many of the cases have involved marginal defamatory conduct—*e.g.*, the charge that an employer is "unfair," or uses the "'big lie' tactics of Hitler," or "treats its employees as criminals"—of a kind that the Labor Board would regard as protected by Section 7. Cf. *Bettcher Mfg. Corp.,* 76 NLRB 526, 527, 532–537; *Thor Power Tool Co.,* 148 NLRB No. 131; *Socony Mobil Oil Co.,* 153 NLRB No. 97. If such cases are permitted to go to judgment, an appreciable chilling

of free debate in circumstances where such debate directly promotes the basic objectives of the NLRA seems likely.

Aside from encroaching on an express and specific policy of the federal labor laws—that which ordains free elections as the exclusive method of determining the bargaining representative when there is a dispute, and, as a concomitant, free and wide-open debate and discussion during representation and other organization campaigns where the support of employees is sought—an unlimited private right to seek redress for defamation is inconsistent with some of the more general features of the federal regulatory scheme. First, the availability of a State court remedy for defamation growing out of a labor dispute may detract from the central regulatory role of the Labor Board. Suppose that a union leader feels that a defamatory statement uttered against him by a rival leader at the very last moment of the representation campaign unfairly swung the election to the rival union. Assuming no restriction on the power of the State courts to entertain such defamation suits, he has a choice of remedies. He may complain to the Board, which might result in the Board's setting aside the election, or he may sue for damages in State court. If he pursues the latter remedy first, the result may be that an election that should have been set aside as not reflecting the actual will of the majority will be left undisturbed, while the controversy "drags on and on in the courts, keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have." *United Construction Workers* v.

Laburnum Corp., 347 U.S. 656, 671 (dissenting opinion).

Further, the availability of a remedy for defamation may disturb the delicate balance between the contestants in a representation or organizing campaign that the federal scheme seeks to create. The threat of broad liability for defamation is, we think, more likely to deter a union from embarking on strenuous organizing efforts in a new plant than it is to dampen the vigor of management in opposing such efforts. Significantly, most of the reported defamation suits have been brought by employers against unions, rather than vice versa (see Appendix B, *infra*). And more generally, the ever-present possibility of a heavy damages award is likely to bear more heavily on weak unions and weak employers than on strong ones, again disturbing the balance intended by Congress.

Finally, there is a danger than unlimited liability for defamation could undermine the uniformity of labor policy among businesses located in different areas of the country which it is a prime object of the federal labor laws to foster. For one thing, there are important differences among the defamation laws of the various States.[9] For another, local or regional

[9] One important difference is that while most States recognize no "conditional privilege" for communications to employees relating to a labor dispute affecting them, a few apparently do. Thus, in *Meyers* v. *Huschle Bros.*, 274 App. Div. 80, 83, 80 N.Y.S. 2d 173, 175, the defendant employer distributed to his employees a circular letter which asserted that the plaintiffs, officials of a labor union apparently engaged in organizing plaintiff's employees, had "Un-American ideas" and misused union dues. In an action for libel based on these allegations it was held that the employer's letter related to "a matter of common interest in connection with the em-

hostility to unions may find effective expression in the enforcement of rights of action for defamation. Suppose, for example, that an independent union attempts for the first time to organize employees in a plant in an area where unions are weak and local feeling (including local judicial feeling) is strongly hostile to unionization. During the organization campaign, some employees are heard to utter disparaging epithets about company officials; the company brings a series of defamation actions in State courts, seeking heavy general and punitive damages; and the State-court judge and jury, sympathizing with the company's objectives and opposed to the union, award the damages sought. Such a result would be indisputably contrary to the basic objectives of federal labor policy. In this connection we invite this Court's attention to the petition for certiorari in *United Steelworkers of America* v. *R. H. Bouligny, Inc.*, No. 19, this Term (certiorari granted, 379 U.S. 958), p. 10, nn. 6 and 7,

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ployment and working conditions of the employees" and that the trial court had erred in striking the defense of qualified privilege. In *Emde & Son* v. *Joaquin County Central Labor Council*, 23 Cal. 2d 146, 143 P. 2d 20, the defendant union was engaged in a labor dispute with plaintiff employer, who had allegedly violated a collective bargaining agreement with defendant. The union published in the local "Labor Journal" an article concerning the dispute and containing matter allegedly defamatory of the employer with respect to his role in the dispute. The Supreme Court of California held, *inter alia*, that, even if the union's charges were false and defamatory, "* * * since the comment was published in a newspaper devoted exclusively to the interests of organized labor, its publication was conditionally privileged" (23 Cal. 2d at 161, 143 P. 2d at 28). *Emde* was followed in *Di Giorgio Fruit Corp.* v. *American Federation of Labor*, 30 Cal. Rptr. 350 (Cal. Dist. Ct. App.).

listing a number of defamation suits against labor unions, "each seeking astronomical damages" (p. 9), which are now pending in federal district courts in the Southeast on removal from State courts. The parallel to the *Times* libel case need not be labored. See 376 U.S. at 294–295 (concurring opinion).

In short, much conduct that may be defamatory under State law would be deemed by the Board to be protected under Section 7 of the National Labor Relations Act. To the extent that such direct conflict is present, it is plain that the State law is preempted (see pp. 10, 22, *supra*). We have also pointed out other respects in which there may be conflict between federal labor policy and State defamation actions. Some restriction on State defamation suits growing out of labor disputes seems plainly necessary to prevent "obvious and unavoidable conflict between the federal and state directives" (*Farmers Union* v. *WDAY*, 360 U.S. 525, 541 (dissenting opinion)); "an explicit conflict * * * [rather than merely] occasional interferences by State law with federal policy" (*id* at 546). We again point out that even a State law not designed specifically to regulate labor relations cannot stand if it is an obstacle to the realization of the congressional will (see pp. 20–21, *supra*). "It is not the label affixed to the cause of action under State law that controls the determination of the relationship between State and federal jurisdiction." *Plumbers' Union* v. *Borden*, 373 U.S. 690, 698.

B. TO PRECLUDE ANY AND ALL DEFAMATION SUITS ARISING FROM LABOR DISPUTES, HOWEVER, WOULD GIVE INSUFFICIENT WEIGHT TO A SUBSTANTIAL STATE INTEREST, AND IS NOT NECESSARY TO EFFECTUATE THE POLICIES OF THE FEDERAL LAW

Obviously the most effective way to avert the danger of encroachment would be to deem all such suits preempted. But this would mean that however great the injury to the reputation of the defamed person, however malicious and unjustifiable the defamatory utterance, and however unrelated it was to any legitimate objective, there would be no remedy. Reputation is not one of the interests with which federal labor law is concerned,[10] and the Board has no power to award compensation for its injury. It is fundamental that the Board acts only to vindicate public rights. See *Garner* v. *Teamsters Union,* 346 U.S. 485; *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261; *Virginia Electric Co.* v. *National Labor Relations Board,* 319 U.S. 533. If ever there was a private right clearly beyond the jurisdiction or competence of the Labor Board to enforce, it is the right not to be defamed. More important, it is neither reasonable as a matter of interpretation of congressional

[10] Thus, when the Board determines that an employee's defamatory statement is protected by Section 7, and that the employer may not discharge him for making it, the Board balances the employer's interest in discipline against the employee's interest in self-organization. If the latter outweighs the former, the Board will find the statement protected, regardless of its impact on the employer's reputation. Similarly, when the Board determines that a statement made in the course of a representation campaign is not a ground for setting aside the election, the Board considers only whether the statement would tend to interfere with a fair and free election, not whether it is injurious to reputation.

intent, nor necessary to effectuate the legislative will, to hold that all right to seek redress for defamations made during labor disputes has been extinguished by the federal labor laws.

Consider the following example. Rival unions are contesting the right to represent the employees of a particular plant. The leader of one union accuses the leader of the rival union of being a homosexual, unfit to hold a position of leadership, and he "documents" this charge—which is wholly malicious and untrue—with forged letters that implicate the rival leader in homosexual acts. The latter loses his job and is forced to leave town, sustaining substantial pecuniary (as well as emotional) injury from the incident. The Board would be powerless to afford him any redress, although the interest in affording some redress in the aggravated circumstances hypothesized is plainly very great—not less, surely, than in the "violence" cases (see pp. 12, 15, *supra*), where this Court recognized a compelling State-protected interest and refused to hold that the federal regulatory scheme superseded it. Moreover, suppressing this kind of defamation would not seriously undermine the federal policies.

On this point the *Times* libel case again provides an instructive analogy. The Court there made clear, rejecting the view of the three concurring Justices, that damages could constitutionally be awarded a public official in a defamation suit against a critic of his official conduct if actual malice was proved, that is, if the defamatory utterance was made "with knowledge that it was false or with reckless disregard of

whether it was false or not" (376 U.S. at 280). If the interest in free and wide-open debate in the political arena thus stops short of requiring the protection of malicious defamation, it is difficult to justify a rule of complete preclusion in the labor arena. There is, to be sure, always the danger that a particular jury might find actual malice in a case where there was in fact none, with the result that a participant in a representation or organizing campaign was penalized for conduct which the Board, had it been the finder of the facts, would have deemed fair and legitimate, indeed federally protected, campaign tactics. But we do not think that this risk is so great as to override the States' strong interest in providing redress for such aggravated instances of defamatory conduct, any more than the risk that a State court might find picketing violent which the Board would find peaceful, would warrant placing the regulation of violence in labor disputes beyond State power under the "arguably protected" formulation.

III

STATE COURTS SHOULD BE PROHIBITED FROM ENTERTAINING DEFAMATION SUITS BASED UPON STATEMENTS ARISING FROM LABOR DISPUTES EXCEPT WHERE (1) THE DEFAMATORY STATEMENT WAS MADE WITH WILLFUL OR RECKLESS DISREGARD FOR THE TRUTH, AND (2) THE DEFAMATION GRAVELY INJURES THE PLAINTIFF'S REPUTATION

We have shown in the preceding part that some defamation suits maintainable under State law seem clearly incompatible with the federal regulatory scheme, and indeed infringe Section 7 protected rights,

while others present far less danger of conflict and at the same time vindicate a compelling State interest. We urge this Court, therefore, to fashion, from the design and policies of federal labor law and the principles of federalism, a reasonably clear and certain standard that will afford a federal defense to some but not all defamation suits growing out of labor disputes. We have already indicated one factor which possibly should be considered in drawing the line: whether actual malice is present. This was the factor singled out by this Court in the *Times* libel case. However, it would not be appropriate simply to transpose the *Times* rule to the labor context and stop there, without examining special considerations which, as we demonstrate *infra*, pp. 41–49, apply to that context and may require additional safeguards. In this part of our brief, we take up these considerations and sketch the basic elements of a sound and workable standard.

A. NO LIABILITY SHOULD ATTACH UNLESS THE DEFENDANT KNEW THAT THE DEFAMATORY STATEMENT WAS FALSE OR WAS RECKLESSLY INDIFFERENT TO WHETHER OR NOT IT WAS TRUE

The rule of the *Times* libel case provides, we believe, a sound starting point for a standard delimiting the scope of defamation in labor disputes. The existence of a complete federal defense to nonmalicious defamation suits arising from labor disputes subject to federal jurisdiction under the labor laws is supported not only by the fact that the Board applies that standard in administering Section 7 of the Act and by the other considerations which we have discussed, but by the common-law principle that there exists a con-

ditional privilege (*i.e.*, a privilege that is forfeited if actual malice is proved) for defamatory communications between those having a common interest where the communications are for the protection or advancement of that interest.[11] Members of religious or professional societies, fraternal, social or educational organizations, families, and labor unions have been held to have a qualified privilege to communicate matter pertinent to the interest of the group. Similarly, communications between the officers, agents or employees of a business with respect to the affairs of the business have been held privileged, on the theory that there exists a common interest in the success of the enterprise. Thus an employee is privileged to inform his employer of the supposed misconduct of a fellow employee, and an employer is privileged to transmit similar information either to another member of management or to other employers.

The justification for this privilege is that the individual's interest in reputation is outweighed by the social desirability of encouraging a person to communicate fully and freely when he is communicating to protect or advance his own interests and those of the recipient of the communication. The reasoning which supports the existence of a conditional privilege in the "common interest" situation described above applies equally to communications by the employer or

[11] See Prosser, *The Law of Torts*, § 95 (2d ed. 1955); 1 Harper and James, *Torts*, § 5.26 (1956); American Law Institute, *Restatement of the Law, Torts*, § 596 (1938); see also Evans, *Legal Immunity for Defamation*, 24 Minn. L. Rev. 607 (1940).

the union to employees, and to communications between fellow employees, with respect to an organizing campaign. Each of these parties—employer, union, and especially the employees—has a substantial interest in whether the employees are to be represented for collective bargaining purposes, and, if so, by whom. Here as in other situations in which there is a group decision to be made on matters of basic importance to the persons involved, full freedom of discussion is indispensable to an informed and reasoned choice between alternatives.

Where actual malice is proved, the defendant's misconduct is more aggravated and less excusable, and the victim's interest in redress greater, than where the defamation is innocent. Moreover, requiring the contestants and other participants in organizing and representation campaigns to refrain only from campaign utterances that they know to be false should not unduly inhibit the free and wide-open debate that federal law seeks to encourage. "[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison* v. *Louisiana*, 379 U.S. 64, 75. Further, the rule of actual malice should be deemed to embrace reckless disregard for whether the defamation is true or false, consistently with this Court's *Times* libel decision (see pp. 38–39, *supra*), to cover the case, for example, of the defendant who is shown to have circulated a pamphlet falsely accusing the plaintiff of being a member of the Communist Party, and, when questioned about the basis for this charge, explains that

he did not know—or care—whether the plaintiff was or was not in fact a member, but simply felt that the charge was an effective campaign tactic. The "reckless" corollary is sometimes put in terms of the defendant's lack of a reasonable basis for believing the defamatory utterance to be true. See 1 Harper and James, *The Law of Torts* (1956), § 5.27, p. 453. But this Court rejected that formulation in *Garrison v. Louisiana, supra,* 379 U.S. at 79, explaining that since "defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth," failure to exercise "ordinary care" to verify the truth of the defamatory utterance does not forfeit the privilege. The test of reckless disregard similarly provides a more appropriate standard that "lack of a reasonable basis" or "failure to exercise ordinary care" whereby to confine State defamation suits in labor matters to the hard core of aggravated and clearly indefensible defamations—which is as far as State power in this area can be permitted to extend without substantial conflict with federal policy.

It should be emphasized that in the *Times* case this Court did *not* hold that actual malice was the only element of proof that must be shown to sustain an award of damages in a suit by a public official against a critic of his official conduct, or that such an award might not be precluded by the Constitution on other grounds. Indeed, in its searching review of the State court's decision, the Court exposed other serious infirmities besides the fact that the jury had not been instructed that actual malice must be proved (see 376 U.S. at 284–292). Moreover, it is plain that special

considerations may be applicable to defining the permissible scope of defamation actions in the labor field, where federal policy favoring free expression and discussion is derived not only from the Constitution, but from the specific provisions (particularly Sections 7 and 9) of the National Labor Relations Act. Finally, it has been suggested that juries are likely to find the concept of actual malice "elusive" (*New York Times Co.* v. *Sullivan,* 376 U.S. 254, 302, n. 4 (concurring opinion)), and it does seem that the distinction between a reckless and a merely negligent failure to verify the truth of a campaign utterance might involve subtleties which jury or judge might sometimes fail to comprehend and which could lead to unfair results in places where hostility to unions is strong.

B. LIABILITY SHOULD ALSO BE PRECLUDED UNLESS THE DEFAMATION IS GRAVELY, AND NOT MERELY TRIVIALLY, INJURIOUS TO THE PLAINTIFF'S REPUTATION, BEARING IN MIND THAT A RATHER HIGH LEVEL OF ABUSE, EXAGGERATION, AND NAME-CALLING IS THE NORM IN LABOR CAMPAIGNS

Many State courts would very likely regard as defamatory and actionable many charges and epithets that are commonplace in representation and organization campaigns. These tend to be heated affairs in which exaggerated, intemperate, and abusive language (whether in campaign speeches or in campaign leaflets, pamphlets, and other written statements) abounds (see pp. 26, 28, 32, *supra*). Such conventionally defamatory words as "liar", "crook", and "skunk" (see 1 Harper and James, *supra,* § 5.2, pp. 357–359) are mild examples of that kind of language. We believe that as a practical matter it is inevitable

that such terms will be bandied about, even recklessly, in such campaigns, and we strongly doubt whether the reputation of the usual victims of such name-calling is often actually injured, or whether there is a very substantial social interest in legal proceedings to redress this kind of abuse.

We submit that this Court should confine State defamation actions arising from labor disputes to grave defamations—those which accuse the defamed person of having committed a felony, or of engaging in sexual misconduct, or of belonging to a disloyal group (*e.g.*, the Communist Party), or of espousing treasonable or disloyal views, or of other misconduct which the community regards as infamous. Under this theory, many of the defamation actions described in Appendix B, *infra,* would be barred at the threshold, without submitting the question whether the defendant acted with actual malice to the jury. An example is *Brantley* v. *Devereaux,* 58 LRRM 2293, 2294, where the alleged defamatory statement was that "[the plaintiff is] going uptown and buying tacks and throwing them in the mill's gates and in people's driveways." As noted earlier (see p. 28, *supra*), the Board itself regards such marginal defamations as within the broad scope of the Section 7 protected right of free and wide-open expression in organizing campaigns.

Charges and countercharges that might be genuinely defamatory in other contexts may be relatively trivial and harmless in the special circumstances of a labor dispute, in particular a representation or organizing campaign, although a State court, having only limited experience with such campaigns, might well not realize

this. Exaggeration, hyperbole, and nasty epithets are expected and hence discounted in such an election campaign, especially since their partisan origin is usually clear. Suppose, for example, that the union distributes a pamphlet which falsely (indeed recklessly) charges the company's president with having once used "scabs" and tear gas to break up a strike. Such a charge would probably be dismissed by most as a piece of campaign literature not worthy of belief. Experience suggests that a defamation suit predicated on such a "thin" (in the circumstances) libel is as likely to be a tactic aimed at crippling the union's organizing efforts as a genuine attempt to remedy a palpable wrong. In this connection we again point out (see pp. 31–32, *supra*) that substantial general damages would be recoverable in such a suit though no actual economic injury to the plaintiff was even alleged.

C. IT IS QUESTIONABLE WHETHER EITHER PUNITIVE DAMAGES OR INJUNCTIVE RELIEF SHOULD BE ALLOWED

Inherent uncertainties as to the scope and application of the limitations suggested in subparts A and B, *supra,* indicate, we submit, that certain additional safeguards may be necessary. Chief Justice Warren, dissenting in *Automobile Workers* v. *Russell,* 356 U.S. 634, noted that "[d]iffering attitudes toward labor organizations will inevitably be given expression in verdicts returned by jurors in various localities" (356 U.S. at 651), and that this threat to the desired uniformity of federal labor policy was aggravated "when the plaintiff is seeking punitive or other dam-

ages for which the measure of recovery is vague or nonexistent" (*ibid.*). The determination of the amount of general damages to be awarded in a defamation action is inherently vague and uncertain. The vagueness and uncertainty are compounded if punitive damages are also recoverable. And, if punitive damages are barred, the State's interest in deterring malicious defamation can still be vindicated in criminal actions. We urge the Court, therefore, to consider whether the federal regulatory scheme should be deemed to preclude the award of punitive damages in defamation actions growing out of labor disputes in industries subject to the federal Act. See Note, 78 Harv. L. Rev. 1670, 1675, n. 28; cf. Prosser, *Interstate Publication,* 51 Mich. L. Rev. 959 (1953). There is direct precedent for such a limitation in the labor field. See *Teamsters Union* v. *Morton,* 377 U.S. 252, 260–261.

While injunctions against defamation are rarely sought, at least one such action has been brought in the labor field. See *Teamsters Local 150* v. *Superior Court,* 56 LRRM 2993, Appendix M, *infra,* p. 55. In view of the traditional disfavor for labor injunctions and the grave danger of unreasonably inhibiting free expression presented by an injunction against an alleged defamatory campaign utterance, we urge this Court to consider whether such suits should also be deemed barred.

D. THE STANDARD ELABORATED ABOVE SHOULD BE APPLICABLE TO ALL REPRESENTATION, ORGANIZATION AND RECOGNITIONAL EFFORTS AND ACTIVITIES, AND, PERHAPS, TO ALL UTTERANCES OR STATEMENTS *ARGUABLY* ARISING THEREFROM

Our discussion has focused mainly on the problem of defamation suits arising from representation campaigns. But it applies with equal force to organizational efforts preceding the actual representation campaign, and indeed to all efforts of either party to a labor dispute to enlist support for its position (see p. 30, *supra*). In other settings—collective bargaining sessions or grievance procedures, for example—other considerations may weigh in the balance; specifically, the interest in encouraging free and wide-open debate may be somewhat less. Since it does not appear that defamation suits arise as frequently in these other settings, we do not propose at this time a federal standard applicable to them as well.

The question might arise in some cases whether the alleged defamation should be regarded as "arising from" a labor dispute to which the federal standard applies. Suppose that a union leader accuses the brother of the company's president of being a "congenital two-faced liar," and he sues for defamation, contending that while the charge was made during a representation campaign it was wholly unrelated to that campaign, since he had absolutely nothing to do with the policies or actions of the company or its officials. Such a suit should not be barred. But there is a risk that contentions of this sort might be effective in unduly whittling down the federal standard we have adumbrated. Therefore, we urge this Court to consider whether the arguably-subject test of *Garmon*

(see p. 17, *supra*) should be deemed applicable to the question of the relevance of the alleged defamation to the labor dispute; under this test, the State court would have to hold the federal standard applicable if it was arguable that the defamation was relevant to the objectives of the campaign.

A final point is that while the federal safeguards should not be applicable where it is clear beyond argument that the defamation was unrelated to the issues of the labor dispute, their applicability probably should not be affected by the fact that the union or employer does not limit publication of its defamatory statements to the employees directly involved in a labor dispute, but publishes to a wider audience, seeking thereby to engender public support for its position. The parties to a labor dispute have a legitimate interest in informing the public of the existence of the dispute and in seeking to attract public support for their respective positions. See Sections 8(b)(4) and 8(b)(7)(C), 29 U.S.C. 158(b)(4), 158(b)(7)(C); cf. *Thornhill* v. *Alabama,* 310 U.S. 88; *National Labor Relations Board* v. *Fruit & Vegetable Packers,* 377 U.S. 58, 76–80 (concurring opinion).

IV

THE INSTANT CASE SHOULD BE REMANDED FOR RECONSIDERATION IN LIGHT OF THE STANDARD OUTLINED HERE

The instant case involves the distribution of leaflets which purported to give a factual account of, and to express an opinion on, matters germane to a labor dispute subject to federal jurisdiction. The employer, in the course of a union organizing campaign, was

charged with concealing its collective bargaining contract at another location, denying its employees there the right to vote in a Board election, and depriving them of pay increases. The opinion was expressed that criminal charges would be filed and that "[s]omebody may go to Jail." Actual malice was alleged. The district court dismissed the case on the pleadings, holding that any defamation suit arising from a labor dispute subject to the Labor Board's jurisdiction is barred under *Garmon,* and the court of appeals affirmed on the same ground. While the judgment of the court of appeals should be reversed and the case remanded to the district court, that court, before proceeding to trial, must determine whether the complaint is barred by federal law, since it is questionable whether a "grave" defamation is alleged as we have defined that term (see pp. 44–46, *supra.*)[12] But we do

[12] A remand would also appear appropriate in *Joint Council 53, International Brotherhood of Teamsters* v. *Meyer*, and *Local 107, International Brotherhood of Teamsters* v. *Meyer*, Nos. 89 and 94, this Term, petitions for certiorari pending. There, one union, in the course of an election campaign preceding an NLRB election, published, allegedly with willful and malicious intent, defamatory matter about the officers of another union, also a party to the election. The Supreme Court of Pennsylvania held the officers' suit for defamation not preempted, but on very different grounds from those we suggest. The court held, in our view erroneously, that the State interest in the protection of reputation is so substantial that the preemption doctrine is totally inapplicable to suits for defamation. 416 Pa. 401, 206 A. 2d 382. The case should be remanded for determination of the factual issues made relevant by the narrower approach set forth here—*i.e.*, whether the statements were arguably germane to the election campaign or whether they were made with actual malice, whether a grave defamation was shown, etc.

not think the suit should be barred merely because the General Counsel of the Labor Board administratively has ruled that the union was not responsible for the alleged defamation.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court for reconsideration in the light of the principles set forth herein.

Respectfully submitted.

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SEPTEMBER 1965.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with re-

spect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

SEC. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

APPENDIX B

Defamation Cases Arising From Labor Disputes

Blum v. *I.A.M.*, 42 N.J. 389, 201 A. 2d 46, 56 LRRM 2417 (Plant manager seeks damages for union statements during organizing campaign, for example, "Joe is using the 'Big lie' tactics of Hitler and the fear and threats like Russian pressures to dictate your future").

Hill v. *Moe*, 367 P. 2d 739 (Sup. Ct. Alaska), certiorari denied, 370 U.S. 916 (Company seeks $100,000 for defamatory union publications in local newspaper, $100,000 for unlawful picketing and $50,000 for each of two employers for mental and nervous strains during union's campaign for recognition).

Warehouse Workers v. *U.S. Gypsum Co.*, 56 LRRM 2829 (Superior Court, Pierce County, Washington) (Union sues employer for allegedly libelous publications disseminated during election campaign).

Schnell Tool & Die Corporation v. *United Steelworkers*, 200 N.E. 2d 727 (Court of Common Pleas, Columbiana County, Ohio), affirmed December 3, 1964 (Ohio Ct. Appeals) (Company sues union negotiator for libelous and slanderous statements).

Teamsters Local 150 v. *Superior Court*, 56 LRRM 2993 (Cal. Dist. Ct. Appeals) (Company attempts to enjoin distribution of union handbill to public during organizing campaign with words: "LIE DETECTOR TESTS are given regular employees. They are questioned about intimate details of their private lives to further embarrass and humiliate them * * * Coca Cola * * * treats its employees as criminals. Help convince the Coca Cola Company that you and other

modern consumers do not believe in these totalitarian practices.").

Troidl v. *Keough*, 58 LRRM 2311 (N.Y. Sup. Ct. Erie County) (Union organizers seek money damages from rival union for publication to employees of letter stating: "raiding organizations have been known to falsify signature cards * * * if the U.A.W. does petition the N.L.R.B. for an election we intend to immediately file charges of FRAUD against them based on the proof we now have that they are using forged signatures on their cards.").

Inland Air Conditioning v. *Bergan*, 57 LRRM 2296 (Cal. Superior Ct., Riverside County) (Employer sues for publication and circulation of allegedly defamatory letter by Union during negotiations).

Meyer v. *Joint Council 53, Teamsters*, 58 LRRM 2183 (Pa. Sup. Ct.) petition for certiorari pending, Nos. 89, 94 this Term. (Individuals campaigning on behalf of rival union sue defendant incumbent unions for circulation of tabloid with statements that active leaders of plaintiff's rival union had been convicted of a list of crimes including rape, sodomy, and corrupting the morals of a minor).

Brantley v. *Devereaux*, 58 LRRM 2293 (E.D. S.C.) (Union officer sues representative of management for statement made during collective bargaining session: "Brantley's going uptown and buying tacks and throwing them in the mill's gates and in people's driveways.").

Bouligny, Inc. v. *United Steelworkers*, 336 F. 2d 160 (C.A. 4), certiorari granted on another issue, 379 U.S. 958 (Employer brought libel action against union for pamphlet during Board election campaign charging that he had fired one of the union's adherents and had sought to procure that employee's discharge from another job obtained by the union).

Dump Truck Owners Assn. v. *Teamsters*, 49 LRRM

2933 (Cal. Superior Ct., Los Angeles County) (Employer association sues union for allegedly libelous publication of articles in union house organ stating that the association was not acting in best interests of his members in its opposition to union's efforts to negotiate contract).

Sullivan v. *Day Publishing Co.,* 58 LRRM 2711 (D. Conn.) (Labor relations consultant of employer sues for allegedly libelous statements by union representatives in two newspapers, "company has hired an out-of-town union buster * * * and he is using all of the oldest tricks of the trade, divide and conquer, by falsehood and fear.").

Oss v. *Birmingham,* 58 LRRM 2754 (Ariz. Sup. Ct.) (Employer sues union officials for slander, "he is unfair").

Record-Chronicle v. *Typographical Union,* 59 LRRM 2200 (Wash. Superior Ct., King County) (Newspaper publisher sues two unions and officers for the distribution of allegedly defamatory leaflets through which $250,000 in damages were allegedly incurred).

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